U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: May 22, 1998

Case No.: 97 INA 330

In the Matter of

DR. FRANK STORTS, CHIROPRACTOR,
Employer

in behalf of

JOSEFINA E. ALAMO,
Alien

Appearance: D. E. Korenberg, Esq., of Encino, California.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of JOSEFINA E. ALAMO("Alien") by DR. FRANK STORTS, CHIROPRACTOR ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On August 14, 1995, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Bookkeeper/Full-Charge" in the Employer's firm, which was engaged in the business of providing his services as a Chiropractor. AF 53. The position was classified as an "Bookkeeper" under DOT Occupational Code No. 210.382-014.[3] The Employer described the job duties as follows:

> Keep records of financial transaction for doctors practice. Use calculator and computer. Verify, allocate and post detail of business transactions to subsidiary accounts in journals and computer files from invoices, checks, patients bills, insurance checks and computer printout. Summarize details in separate ledgers or computer files and transfer data to general ledger. Reconcile and balance accounts. Compile reports to show cash receipts and expenditures, accounts payable and receivable, profit and loss statements. Calculate employee's wages and prepare check for payment of same. Prepare withholding, Social Security and other tax reports.

AF 53 at Item 13. (Copied verbatim without change or correction.) The minimum education Employer required for a worker to perform satisfactorily the job duties described in Item 13 of ETA Form 750A was completion of high school. The experience requirement was two years in

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[3]**210.382-014, BOOKKEEPER (Clerical)** Keeps records of financial transactions for establishment, using calculator and computer: Verifies, allocates, and posts details of business transactions to subsidiary accounts in journals of computer files from documents, such as sales slips, invoices, receipts, check stubs, and computer printouts. Summarizes details in separate ledgers or computer files and transfers data to general ledger, using calculator or computer. Reconciles and balances accounts. May compile reports to show statistics, such as cash receipts and expenditures, accounts payable and receivable, profit and loss, and other items pertinent to operation of business. May calculate employee wages from plant records or time cards and prepare checks for payment of wages. May prepare withholding, Social Security, and other tax reports. May compute, type, and mail monthly statements to customers. May be designated according to kind of records of financial transactions kept, such as Accounts-Receivable Bookkeeper (clerical), and Accounts-Payable Bookkeeper (clerical). May complete records to or through trial balance.GOE: 07.02.01 STRENGTH: S GED: R4 M4 L3 SVP: 5 DLU:77

the Job Offered. *Id.*, at Item 14.[4] As initially filed, Item 15 stated the following as his Other Special Requirements:

> Experience must include use of Lotus 123, Quicken, Peachtree and MS Excell software and 10 key by touch. A test will be given to verify ability to perform job duties and use of required software and 10key by touch.

See AF 53, and 55. Although ten applicants responded after this position was advertised and posted in the recruitment process required by the Act and regulations, the Employer rejected all of the U. S. candidates who applied. AF 52.[5]

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") dated April 9, 1996. AF 47-51. The CO stated the defects and the rebuttal necessary to cure the defects, and then the CO explained the following as the reasons for the denial of alien labor certification. (1) Based on evidence that questioned whether the Employer had a current job opening and was operating an on-going business, the CO found that the Employer had failed to offer sufficient evidence to establish that he is offering permanent full time work to which U. S. workers could be referred under 20 CFR § 656.3.

(2) Citing 20 CFR § 656.21(b)(2)(i)(A)[6], the CO found unduly restrictive Employer's job requirement that applicants for the job must take a test. Observing that the requirement that candidates for the position take such a test has a chilling effect on the referral of U. S. workers under 20 CFR § 656.3, the CO explained that this recruiting procedure is an unduly restrictive precondition because the testing of resume qualified job applicants is not normally required for the successful performance of this position in the United States. In support of this finding, the CO said (1) the Employer failed to submit a copy of the test he had administered; (2) he failed to provide that the test had been administered to the Alien before she was hired or to show that she had passed the test; (3) and that the Employer failed to provide evidence from an independent source that his test was usual, normal and consistent with the stated job duties.[7]

(3) Citing 20 CFR §§ 656.21(b)(6), 656.21(j)(1)(iii), and 656.21(j)(1)(iv), the CO then found that the Employer failed to furnish lawful, job-related reasons for his rejection of U. S.

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[4]The hours were 9:00 AM to 6:00 PM in a forty hour week at $1,944 per month, with time and a half for overtime as needed.

[5]The Alien is a national of the Philippines, where she completed high school and received post high school training from 1973 to 1983, and worked as a personnel assistant from 1978 to 1983. From December 1984 to the date of application the Alien worked in Commerce, California, as a "Bookkeeper/Full-Charge" in a Credit Union, where her duties were identical to the Job Duties itemized in Part 13 of Form ETA 750 A, which is quoted *supra.*

[6]See **Information Industries, Inc.**, 88 INA 082.

[7]Under 20 CFR § 656.21(b)(2)(ii) the CO must consider a U. S. worker qualified for the job if by education, training, experience, or a combination of these the worker.

workers Nabavi, Eltanal, and Quan. In addition, the Employer did not establish that he made a good faith effort to recruit qualified applicants Wong, McGee, and McDaniels after these U. S. workers were referred by the state employment security agency ("SESA").

By way of rebuttal the Employer was required to present probative evidence *inter alia* that (1) the Alien had taken and passed the same test under the same standards before she was hired, (2) the above-named U. S. workers lack the requirements stated in the Form ETA 750 A, and (3) that each of the U. S. workers was rejected for reasons that were lawful and job related.

Rebuttal. The Employer's May 14, 1996, rebuttal addressed the issues stated in the NOF. AF 17-46. (1) To prove his existence as an on-going business, the Employer filed his business license, copies of state and Federal business income tax returns, copies of current business correspondence and billing for service, and evidence of his pursuit of further business by advertisements of the chiropractic services he offered. AF 25-44. (2) Employer asserted that he had provided a copy of the test the Alien had taken and opinion evidence that the test correctly addressed the duties of this position, as stated in the application. After the thorough examination of the Appellate File, the panel observes that the Employer filed an opinion by a certified public accountant, who said the accounting test was based on second year accounting course textbook and was relevant to the bookkeeping duties Employer listed for the job. The test, itself, however, was not made evidence in the rebuttal or in any other part of this file, notwithstanding counsel's assertion to the contrary. Compare AF 18. Moreover, the Employer did not present probative evidence that the Alien had taken and passed the same test before she was hired, or that the above-named U. S. workers had been tested and lacked the capacity to perform any of the job requirements stated in the Employer's Form ETA 750 A at item 13. Although this opinion appeared at AF 45-46, neither Employer's application nor the SESA referral nor the rebuttal presented evidence that Alien, herself, ever took or passed the test, itself.[8] To some extent this was confirmed by the Employer's statement of the events surrounding the recruitment of the applicants, which included his admission, "None of the other applicants took the test, however." As the Employer's statement at AF 22-24 will be compared with the questionnaire responses of the named applicants, the attorney's remarks in rebuttal will be considered as argument on this issue. AF 19-21.

Final Determination. The CO denied certification in the Final Determination issued of July 26, 1996. AF 15-16. While the CO found the evidence of permanent, full time employment insufficient, the primary reasons for the denial of certification were Employer's restrictive requirement and his failure to provide reasons for rejecting the U. S. job applicants that were lawful and job-related. After the CO denied certification, the Employer requested review of the

[8]While the Employer's own statement asserted that the Alien took the test and passed it, this is not the evidence that he was directed to file in the NOF. See AF 22. Moreover, while the test was mentioned in the advertisements, it was not mentioned in the posted notice, contrary to counsel's assertion in the cover letter at AF 128, with which compare AF 136. As this omission was not identified by the CO as a reason for rejecting this application, however, it has not been considered on review.

Final Determination in an undated petition and brief that the CO received on September 3, 1996.

Discussion

While the CO and the Employer discussed a test they described as a prerequisite for hiring, both the U. S. candidates responding to the SESA questionnaire and the Employer, himself, left no question that such a test of skills was never administered to any U. S. worker seeking this job. As the assertions to the contrary by the Employer and the Employer's lawyer were given without supporting evidence, they were not persuasive. **Gencorp**, 87 INA 659 (Jan.13, 1988)(*en banc*).[9] For this reason it is reiterrated that no evidence supports a finding that the Alien ever took or passed the test. Because neither the Alien or any U. S. worker took the Employer's hiring test, there is no reason for the panel to consider this possibly restrictive job requirement in reviewing the CO's rejection of this application. As a result, any of the Employer's statements making reference to such a test have been discounted, as the test could not have been considered in the rejection of any job applicant. In addition, the CO cannot have been persuaded by Employer's vague assertions regarding such a test, since he offered no specific data or other facts, or anything beyond general statements that were not connected with such tangible data as the record presented.

Good Faith Effort. On the other hand, an employer's actions indicating a lack of good-faith effort are a basis for denying alien labor certification. Where good faith recruitment is not established by the evidence of record, it will be found that the employer has failed to prove that there are not sufficient U. S. workers who are "able, willing, qualified and available" to perform the work as required by 20 CFR § 656.1. 20 CFR § 656.20(c)(8) provides that the job opportunity must have been open to any qualified U. S. worker. It follows that employers are required to make a good-faith effort to recruit qualified U. S. workers for the position. **H. C. LaMarch Ent., Inc.**, 87 INA 607 (Oct. 27, 1988). 20 CFR § 656.20(c)(8) must be applied with 20 CFR § 656.20(c)(6) (now recodified as 20 CFR § 656.20(b)(5)), which provides that an employer must show that U. S. applicants were rejected solely for lawful, job-related reasons. In the NOF the CO cited 20 CFR §§ 656.21(b)(6), 656.21(j)(1)(iii), and 656.21(j)(1)(iv) to explain that the Employer failed to furnish lawful, job-related reasons for rejecting U. S. workers Nabavi, Eltanal, and Quan, and that the Employer did not establish that he made a good faith effort to recruit qualified applicants Wong, McGee, and McDaniels. All of the named U. S. workers were referred to the Employer as qualified for the position on the basis of their resumes that SESA had examined and compared with the job duties in Form ETA 750A at item 13.

Nabavi, Eltanal, and Quan. After the Employer reviewed the resumes of U. S. workers Nabavi, Eltanal, and Quan, he sent all of them letters requesting interviews, which they attended. Ms. Nabav agreed that she was rejected because she wanted an amount that exceeded the wage rate that Employer offered in the job announcement. AF 63. Despite having reported that she was

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[9]To the same effect see **Our Lady of Guadalupe School**, 88 INA 313 (Jun. 2, 1989); **Inter-World Immigration Service**, 88 INA 490 (Sep. 1, 1989), and **Tri-P's Corp.,** 88 INA 686 (Feb. 17, 1989)..

neither contacted nor interviewed by the Employer, her questionnaire response that she expected $2,500 "to start" tends to corroborate the Employer's representation that she demanded more than the salary offered and persuasively corroborates the existence of a job-related reason for rejecting this U. S. worker. AF 82. As no questionnaire for Mr. Eltanal was found in the record, his rejection cannot be reviewed in this proceeding, as no other evidence of record discusses the Employer's efforts to recruit him for this position. AF 63, with which compare 89-92. The Employer said Ms. Quan was rejected because she had "never worked as a Full Charge Bookkeeper." AF 63. In Ms. Quan's response to the questionnaire she disputed the Employer's assertion and said she was not offered the job was that she was not familiar with Peachtree software program, even though she was familiar with Lotus 123, Microsoft, Excell, 10Key, and other software. Ms. Quan further complained that the Employer did not give her "the opportunity to take the test during the interview" and that the other software programs "can be easily learned on the job." AF 105-106. While the panel agrees with Ms. Quan's interpretation, the CO did not challenge Employer's assertion that her resume did not meet the level of experience specified in the Form ETA 750A, which Ms. Quan did not dispute. Consequently, the Employer's reason for rejecting this U. S. worker was job-related within the meaning of 20 CFR § 656.20(b)(5).

Wong, McGee, and McDaniels. The record was further examined to determine whether the Employer sustained his burden of proving that he made a good faith effort to recruit U. S. applicants Wong, McGee, and McDaniels. The Employer's investigation of the candidates to whom he sent requests for interviews confirmed that these candidates met his major job requirements. **Gorchev & Gorchev Graphic Design**, 89-INA-118(Nov. 29, 1990(*en banc*); and see **Dearborn Public Schools**, 91-INA-222(Dec. 7, 1993)(*en banc*).

The Employer said he had requested Mr. Wong to attend a job interview, after which the Employer reported that,

> Mr. Wong arrived on the scheduled date and was asked to fill out a routine employment application. After a few minutes, Mr. Wong unexpectedly stood up and said that he had to be somewhere, then he stood up, took the application and left in a hurry without saying anything further. Mr. Wong has never contacted us in order to reschedule the interview, therefore we must conclude that he is no longer available for employment.

AF 63. This report was deceptively simple. In his questionnaire response Mr. Wong said he was contacted by mail but was not interviewed and was not offered the job, even though he felt he met the requirements of the job offer. He explained, however, that a second applicant arrived for an interview that the Employer apparently had scheduled for the same time. As a result, Mr. Wong declined to participate in what appeared to be a group job interview in the presence of one or more competing candidates. AF 93.

Although an employer's recruitment report must give the details of the employer's contact with applicants to be sufficient, the Employer failed to explain or deny the assertions in Mr. Wong's reply to the SESA questionnaire. See **Yaron Development Co., Inc.**, 89 INA 178 (Apr.

19, 1991)(*en banc*).[10] The Employer's rebuttal filings of May 8 and May 14, 1996, neither addressed nor offered a reply to Mr. Wong's report concerning the Employer's conduct in the scheduling of his job interview. AF 07-08, 20, 24. Although statements of job applicants that are contrary to those of the employer should not automatically be given greater weight, we find that it is appropriate to do so in this case, based on the evidence of record. **Robert B. Frye, Jr.**, 89 INA 006 (Dec. 28, 1989). As the Rebuttal process gave Employer the opportunity to respond to Mr. Wong's assertions, the repetition in his appellate brief of his original recruitment report failed to confront Mr. Wong's allegations and is disingenuous and is not persuasive in the context of this record. The remarks of Mr. Wong and the Employer's failure to respond confirms Mr. Wong's allegations of conduct that clearly had a chilling effect and discouraged this well-qualified U. S. applicant.[11] There was sufficient evidence for the CO to conclude that this Employer's behavior during the recruitment process had a chilling and material impact on his test of the availability of workers in the U. S. labor market under the Act and regulations.[12]

In Ms McGee's response to the follow up questionnaire she said she was not contacted by the Employer and was not scheduled for an interview, although she felt she met the requirements of the job offer. AF 83. The Employer furnished a copy of a letter scheduling a job interview to which it attached a return receipt form that was signed by person named "McGee" at the mailing address, whose given name was other than that of the U. S. worker who applied for this job. AF 88. Moreover, when Ms. McGee did not appear at the interview at the scheduled time, the Employer did nothing to determine whether or not his notice was delivered to her, and he cannot have inspected the Certified Mail return receipt to ascertain whether or not she had signed the receipt or whether it actually was received in hand by her. As it may be inferred that the Employer sent letter by certified mail and the applicant did not receive the letter because it was misdelivered, it is clear that the Employer was at fault because he failed to require "Restricted Delivery" of the notice as an available added service that was listed on the Domestic Return Receipt, itself. It follows that the Employer's effort to communicate with Ms McGee was not successful for reasons that remained the Employer's responsibility and were not shifted to this qualified job applicant, who clearly wanted the opportunity to compete for the position offered.

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[10] While the remarks of Employer's attorney did not add anything to his recruitment report, in weighing this record it must be emphasized in this case that assertions by an employer's attorney which are not supported by underlying statements by a person with knowledge of the facts do not constitute evidence. **Moda Linea, Inc.**, 90 INA 424 (Dec. 11, 1991)

[11] The panel has examined Mr. Wong's resume at AF 95-96, and has noted with interest the strong, favorable recommendations provided by two former supervisors. AF 97-98. The remarks of the supervisor still associated with his most recent employer at AF 97 bears quoting: "Mr. Wong would be an asset to any organization and I would recommend him highly.".

[12] In **Lin and Associates**, 88 INA 007(Apr. 4, 1989)(*en banc*), and **Vermillion Enterprises**. 89 INA 043(Nov. 20, 1989), BALCA held that an employer is not permitted to place unnecessary burdens on the recruitment process or otherwise engage in behavior that has the effect of discouraging U. S. applicants for the position offered.

AF 84.

Although an employer's recruitment report must give the details of the employer's contact with applicants to be sufficient, the Employer failed to explain or deny the assertions in Mr. Wong's reply to the SESA questionnaire. See **Yaron Development Co., Inc.**, 89 INA 178 (Apr. 19, 1991)(*en banc*).[13] While Employer's failure to contact Ms McGee may be explained, the result constituted a failure to recruit in good faith, since in this instance the misdelivery of the certified mail notice of the scheduled interview resulted from the Employer's failure to insure delivery of the notice to the addressee, herself. **Loma Linda Foods, Inc.**, 89 INA 289 (Nov. 26, 1991)(*en banc*).[14] In general, an applicant is considered qualified for the job, if he meets the minimum job requirements. **United Parcel Service**, 90 INA 090 (Mar. 28, 1991). The Employer has not shown that Mr. Wong and Ms Mc Gee are not qualified and could not perform the main job duties. **The Weck Corp., d/b/a Gracious Homes**, 93 INA 035 (Mar. 8, 1995); **Quality Inn**, 89 INA 273 (May 23, 1990).

For the reasons discussed above, the evidence in the Appellate File supported the CO's finding that the Employer failed to establish that he made good faith efforts to recruit Mr. Wong and Ms. McGee, both of whom were qualified candidates for the job. Consequently, the denial of alien labor certification should be affirmed and the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

[13] While the remarks of Employer's attorney did not add anything to his recruitment report, in weighing this record it must be emphasized in this case that assertions by an employer's attorney that are unsupported by underlying statements by a person with knowledge of the facts do not constitute evidence. **Moda Linea, Inc.**, 90 INA 424 (Dec. 11, 1991)

[14] The Employer requested Ms McDaniels to attend a job interview based on a reading of her resume, which qualified her for the job offered. After the interview was duly scheduled, Ms. McDaniels informed him that she had found a job and apparently did not wish to be considered for this position. AF 64. In her reply to the questionnaire she confirmed the Employer's representation that he scheduled an interview that was not held because she had accepted a position elsewhere at the time she was contacted. While some question might be raised on circumstances under which a second letter was required to make contact with this U. S. applicant, the issues concerning the Employer's good faith as to Ms. McDaniels became moot during the pendency of the recruiting process.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.